1986

Cherie Annette Greene v. Robert Michael Green : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHERIE ANNETTE GREENE,	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	
	:	
ROBERT MICHAEL GREEN,	:	Case No. 860454
Defendant-Appellant.	:	Category No. 13b

RESPONDENT'S BRIEF

Appeal from a Judgment of the First District Court
of Box Elder County, Judge VeNoy Christoffersen

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. The issue of whether defendant's military retirement pension is marital property subject to division is not properly before the Court, since it was not raised in the lower court proceedings.

2. If this issue is properly before the Court, then the defendant's military retirement pension is marital property subject to division in Utah.

3. The Trial Court's clarification or interpretation of the decree did not amount to a modification.

STATEMENT OF CASE

This matter is before the Court following the Trial Court's denial of defendant-appellant's motion seeking termination of payments to plaintiff-respondent under the Uniformed Services Former Spouse Protection Act (10 U.S.C. Section 1408). The appellant-husband requested that the Trial Court interpret the division of his retirement pay in the decree as alimony, while plaintiff-respondent took the position that the division of appellant's military retirement pay was a division of property, not an award of alimony. The District Court concluded that the division of appellant's retirement pay in the Decree of Divorce had been a division of marital property and not an award of alimony, and denied appellant's request.

At this point, respondent would point out that appellant's Statement of the Case and Statement of Facts are misleading, erroneous, and argumentative. Respondent submits that it is improper for a litigant appearing before this Court to make factual assertions which are not supported by the record and, further, that this Court need not, and should not, consider any facts not properly cited to or supported by the record. See Golden Key Realty vs. Mantas, 699 P.2d 730 (Utah, 1985); Uckerman vs. Lincoln National Life, 588 P.2d 142 (Utah, 1978).

In his Statement of the Case, appellant states that the parties stipulated and agreed prior to the divorce that appellant's military retirement income was not subject to division as marital property, but was a source of income to be used in determining the amount and securing the payment of spousal and child support. In fact, the parties entered into a written Stipulation and Agreement which says no such thing. (R., 4 and 6).

The Stipulation was incorporated into the Findings of Fact and Conclusions of Law (R., 10), and the Decree of Divorce (R., 12-15).

Appellant next asserts that the treatment of the military retirement pay as alimony was reaffirmed in a subsequent Order on Order to Show Cause (R., 33), when in fact the Court in that Order specifically reaffirmed that the alimony payment was $490.00 per month, which makes it entirely separate from the military retirement pay (R., 34).

Appellant next states that the Court amended the Decree of Divorce to designate defendant's military retirement income as marital property and denied appellant's motion to terminate monthly payments from his retirement income. In fact, the Court ruled that defendant's military pension had been divided between the parties as property (R., 87; R., 84). The only modification made by the Court in the Order appealed from was to change the designation of respondent's share of the military pension to one-half of the disposable or net retirement pay instead of one-half of the gross retirement pay.

STATEMENT OF FACTS

Appellant's Statement of Facts, as with his Statement of the Case, is inaccurate, incorrect, and misrepresents a great deal of material which is not part of the record. For example, appellant refers to his "long and distinguished" Air Force career (nothing in the record); appellant's statement that Paragraph 8 of the Decree of Divorce specified $1,370.00 per month spousal support (a blatant misstatement, see R., 4-7); the statement that this amount was "specifically intended by the parties to cover plaintiff's anticipated monthly expenses" (nothing in the record, this is merely appellant's fanciful version); references to the parties discussions and negotiations (not part of the record); defendant reporting deductions from his retirement pay as alimony (nothing in the record, in fact, respondent did not report them as income, although that is

not part of the record either); a reference in the middle of Page 5 of his brief to the fact that the parties "still regard defendant's military retirement pay as income" (a misstatement unsupported in the record); a reference that, following the 1984 hearing, the Court left the "spousal support obligation unchanged" an "reaffirmed that the military retired pay was being treated as income, not property" (the Order speaks for itself, R., 31-34). The Statement of Facts is replete with other factual errors and misstatements in addition to those noted above. Respondent would again request the Court to apply the doctrines enunciated in Golden Key and Uckerman, supra, and ignore any of appellant's "facts" which are not supported by the record. Respondent submits the following Statement of Facts.

RESPONDENT'S STATEMENT OF FACTS

The parties were married in 1956, the same year defendant began his career in the United States Air Force. Two children were born of the marriage, one of whom is mentally handicapped and, at the time of the hearing from which this appeal arises, was still dependent upon parental support. Defendant subsequently retired from the U.S. Air Force in 1976, and began receiving his military retirement pension in approximately 1976.

In May 1983, respondent (hereinafter referred to as plaintiff) filed a complaint for divorce through her previous attorney. Plaintiff and appellant (hereinafter referred to as defendant) executed a Stipulation and Agreement dated May 13, 1983 (R., 4-8). The critical part of that stipulation for this appeal is contained in Paragraph 8 thereof, as follows:

"Defendant agrees to pay, pursuant to 10 USC section 1408, of the Uniform Services Former Spouses Protection Act, 1/2 of USAF retired gross pay, 1/2 of which at present is $880, plus $490 alimony, plus $150 child support for Robert Jr. each per month. Said sums will be deposited to a bank account in the name of the Plaintiff. The amount of alimony may be renegotiated annually, by agreement if possible, or by court order if agreement is not possible, and there has been a substantial change in circumstances. If Robert Jr should become employed full time and/or become self supporting, child support payments shall cease. Defendant and Plaintiff may be ordered to supply such financial records as necessary at time of any renegotiations to substantiate any claims for adjustment of alimony or child support."

On June 28, 1983, plaintiff appeared with her then-attorney, presented the Stipulation to the Court, and the Court ordered that the terms of the divorce were to be as set forth in the Stipulation, with those terms to be incorporated into the Findings and Decree (R., 9). The Findings of Fact and Conclusions of Law provided that the

Decree should incorporate all matters stated in the Stipulation (R., 10 & 11), and a Decree of Divorce was entered on July 8, 1983, incorporating the terms of the Stipulation. Paragraph 8 of the Stipulation also appears, verbatim, as Paragraph 8 of the Decree (R., 15).

In February 1984, defendant filed an Affidavit and obtained an Order to Show Cause seeking modification regarding some insurance policies, child support, and alimony (See Affidavit of Defendant, R., 17-19).

Plaintiff filed a Response and Counter-Affidavit (R., 21-25), seeking, among other things, to have her half of defendant's retirement pay paid to her directly from the Air Force. An Order was subsequently entered on February 28, 1984 (R., 31-34). In that Order, the Trial Judge dealt with the retirement pay in Paragraph 10, and dealt separately with the alimony in Paragraph 12. In the said Paragraph 12 (R., 34), the Court refused to change the alimony, finding that the defendant remained able to "pay the full alimony ordered in the Decree of Divorce", stating that "the defendant shall continue to pay the sum of Four Hundred Ninety Dollars ($490) per month alimony to the plaintiff". This Order was not appealed.

Thereafter, in November 1985, defendant filed a Motion with the Court seeking termination of alimony "to include that portion being withheld from his retired pay", and further seeking termination of the requirement that defendant maintain the plaintiff as beneficiary under some life insurance policies. (R., 47-48).

Plaintiff responded to the Motion, admitting her remarriage and admitting that alimony in the sum of $490 per month should be terminated, although affirmatively alleging that defendant was at that time several thousand dollars behind in his alimony payments, and further pointing out that alimony and the division of defendant's military retirement pay had absolutely nothing to do with one another. (R., 51-52).

Since the defendant had taken the liberty to submit an Order to the Court terminating plaintiff's interest in defendant's military retirement pay, an objection to that Order and a Request for Hearing were also filed (R., 53), and plaintiff also filed her Affidavit in Support of Order to Show Cause and Order to Show Cause (R., 57-61).

Defendant's Motion and plaintiff's Order to Show Cause were consolidated for hearing, and the plaintiff filed a request that the Honorable VeNoy Christofferson hear the matters since he had heard the original Decree of Divorce and the previous Order to Show Cause. (R., 60).

The consolidated matters were heard on May 22, 1986, and a full transcript of that hearing is included with the record. At the hearing, both parties argued the matters before the Court, and although plaintiff offered to present testimony, the Court declined to hear any, stating as follows:

"I think from what I've seen that I can go on what your documents and orders and prior pleadings and decree are." (T., 33, lines 11-13).

The parties and the Court had some further discussion concerning the Court deciding the matter on the record rather than taking testimony (T., 33-34), with the Court ultimately concluding that if he ran into a problem he felt was important enough then he would reopen the case and hear testimony (T., 34, lines 14-17).

The Court entered a Memorandum Decision without requesting or hearing any testimony (R., 72-74), followed by an Order (R., 83-84), and Findings of Fact and Conclusions of Law (R., 85-90).

The Order awarded judgment to the plaintiff for alimony arrearages calculated at the rate of $490 per month (R., 77), ruled that the division of defendant's military retirement pay "has been and shall be considered as a division of property, and is not and was not alimony" (R., 84). The Order further amended the Decree of Divorce to provide that plaintiff's share of defendant's military retirement pay should be one-half of his disposable or net retirement, instead of one-half of his gross retirement (R., 84), in order to comply with the provisions of 10 U.S.C., Section 1408.

Defendant appeals from those parts of the Order dealing with the military retirement pay.

SUMMARY OF ARGUMENT

POINT I

DEFENDANT'S ISSUE CONCERNING WHETHER MILITARY RETIREMENT PAY IS MARITAL PROPERTY SUBJECT TO DIVISION WAS NOT RAISED BELOW AND CANNOT BE RAISED FOR THE FIRST TIME BEFORE THIS COURT.

POINT II

EVEN IF THIS COURT CHOOSES TO REVIEW THE ISSUE OF MILITARY RETIREMENT PAY, IT SHOULD BE TREATED AS MARITAL PROPERTY SUBJECT TO DIVISION IN A DIVORCE.

POINT III

THE LOWER COURT PROPERLY INTERPRETED IT'S OWN DECREE, FINDING THAT THE DEFENDANT'S RETIREMENT PAY WAS DIVIDED AS MARITAL PROPERTY AND NOT AS ALIMONY.

ARGUMENT

POINT I

THE ISSUE OF WHETHER DEFENDANT'S MILITARY RETIREMENT PAY MAY BE TREATED AS MARITAL PROPERTY IS RAISED FOR THE FIRST TIME UPON APPEAL AND THEREFORE IS NOT PROPERLY BEFORE THE COURT.

On appeal, for the first time, defendant attempts to raise the issue of whether or not military retirement pay may be treated in the same fashion under Utah law as other types of retirement pay. This issue has never been raised at any time before the Trial Court in this matter, and certainly was not raised in the hearing or in the Order being appealed.

In fact, the issue was stipulated to by the parties in their initial Stipulation. In that original agreement (R., 4-7), the parties specifically refer to 10 U.S.C, Section 1408, entitled the Uniformed Services Former Spouses Protection Act, and specifically divided the defendant's retirement pay half to the plaintiff and half to the defendant. In his Motion, defendant did not raise the issue of whether or not the military retirement pay was subject to being divided; rather, the thrust of the Motion was that the agreed-upon division should be construed as alimony rather

than property. At the hearing on May 22, the defendant's argument had nothing to do with whether or not the Court had authority to divide the military retirement pay. In fact, defendant specifically stated, in his argument, that the Court did have the right to divide military retirement pay as marital property, stating in his argument as follows:

"Now, had that been intended as a property settlement award, which under the statute which I will get to shortly can be done, then it would have normally appeared as a separate, distinct award of property. It was not done that way." (T., 4, lines 21-25).

Mr. Richardson further stated:

"The public law involved is the Former Spouses Protection Act and I would ask the Court to take judicial notice of it. Here is a copy of it. And initally on Page 1 you will find that support can be awarded from this as child support, alimony, and/or as a division of property. Any of the three can be done." (T.,5, lines 9-14).

Defendant's entire argument below was to the effect that the division of his retirement pay was intended as spousal support and not as property. Not once in these entire proceedings has the defendant ever raised the issue now raised on appeal in his Point I.

The well-established and often cited rule of this Court is that matters not presented at hearing or trial in the

lower court cannot be raised for the first time on appeal. See Bundy vs. Century Equipment, 692 P.2d 754 (Utah, 1984); Trayner vs. Cushing, 688 P.2d 856 (Utah, 1984); Bangerter vs. Poulton, 663 P.2d 100 (Utah, 1983); Park City Utah Corporation vs. Ensign Company, 586 P.2d 446 (Utah, 1978).

POINT II

IF THE COURT HEARS THE ISSUE OF WHETHER MILITARY RETIREMENT PAY IS MARITAL PROPERTY, THE COURT SHOULD TREAT MILITARY RETIREMENT PAY AS IT DOES OTHER TYPES OF RETIREMENT PAY.

Utah law specifically provides for the equitable division of retirement pay, and military retirement pay should not be treated any differently.

In the case of Woodward vs. Woodward, 656 P.2d 431 (Utah), this Court carefully and thoroughly considered the issue of retirement pay and how it should be treated in divorce actions under Utah law. In partially overruling the earlier case of Bennett vs. Bennett, 607 P.2d 839 (Utah, 1980), and upholding the Trial Court's award of a portion of the husband's retirement to the wife, the Court stated as follows:

"The wife urges the adoption of the position taken by the California Supreme Court in In re Marriage of Brown, 15

Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976). There the court held that "[p]ension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." Id. at 562-63, 126 Cal.Rptr. at 634-35. This case overruled an earlier California case of long standing which had distinguished pension rights on the basis of whether the rights had vested. In the context of Utah law, we find it unnecessary to consider whether or not the pension rights are "vested or non-vested." In Englert vs. Englert, Utah, 576 P.2d 1274 (1978), we emphasized the equitable nature of proceedings dealing with the family, pointing out that the Court may take into consideration all of the pertinent circumstances. These circumstances encompass "all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance." (Woodward, Page 432).

This Court continued, in referring to pension rights, as follows:

"If the rights to those benefits are acquired during the marriage, then the Court must at least consider those benefits in making an equitable distribution of the marital assets. 'The right to receive monies in the future is unquestionably...an economic resource' subject to equitable distribution based upon proper computation of its present dollar value." (Citations omitted). Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution." (Woodward, Page 432-433).

Defendant argues that this Court has never addressed the specific issue of whether or not military retirement pay is subject to division upon the dissolution of a marriage. It is respectfully submitted that the issue was decided in Woodward.

As this Court stated in Woodward, Utah uses a very broad, equitable approach in proceedings dealing with the family and the division of assets in a divorce case. As noted above, this includes all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.

Equity focuses upon the substance of a transaction rather than its form, as this Court did in the Woodward case.

In the case of Linson vs. Linson, 618 P.2d 748 (Hawaii), the Hawaii Appeals Court considered the issue f military retirement pensions. In ruling that a spouse's non-vested

military retirement benefit constituted a part of the estate of the parties for purposes of division in a divorce proceeding, the Court considered and reviewed cases from several jurisdictions, some holding that military retirement benefits were not divisible property, and some holding that they were. The Hawaii Court stated;

> "In reading the opinions of courts which have passed on this issue we come to the conclusion that those courts which hold that nonvested retirement benefits are cognizable or divisible do so on the basis of equity, although this is sometimes left unsaid. Courts holding that such benefits are not cognizable or divisible, on the other hand, appear not to have considered equity at all, but to have rather mechanically applied rules of property law." (Linson, P 750-751).

Defendant cites the Court to the case of Slaughter vs. Slaughter, 421 P.2d 503 (Utah, 1966), in support of his position that military retired pay is governed by an entirely different set of legal principles and policies. In fact, Slaughter is a per curium opinion which does not even remotely discuss the issue of retirement pay. The Court simply noted in that case that the defendant received military retirement pay, was a retired colonel, and then upheld the Trial Court with absolutely no discussion of any of the issues in the case.

Defendant next provides the Court with a lengthy discussion of a series of U.S. Supreme Court cases, culminating in the recent case of McCarty vs. McCarty. Defendant correctly states the holding and reasoning of the McCarty case, but incorrectly urges the Court to adopt it as current law.

The McCarty case, and everything it stands for, was promptly rejected and overturned by Congress through the enactment of Title 10 U.S.C. Section 1408, commonly referred to as the Uniformed Services Former Spouse Protection Act. A copy of this Act is attached to defendant's brief. In fact, Congress specifically made this act retroactive to the date of the McCarty decision (June 25, 1981) specifically to avoid the harsh and inequitable effect of the McCarty case upon divorced spouses of military personnel (Smith vs. Smith, 458 A.2d 711 (Delaware, 1983)). While it is true that each individual state may reach its own decision as to whether military retirement pay is a marital asset subject to being divided, it is difficult to see how this Court, in view of the Woodward decision, could equitably treat military retirement pay differently than any other type of retirement pay.

Defendant argues to the Court that the "vast majority" of common law jurisdictions continue to follow the principles enunciated in the McCarty case, holding that military retirement pay is not subject to division in a divorce action. In support of this contention defendant

cites several cases decided prior to the enactment of the Uniformed Services Former Spouse Protection Act. At this time state courts did not have the option of deciding whether military retirement pensions could be divided, because several cases prior to the McCarty case had been fairly consistent in holding that the states could not interfere with military retirement pensions.

Defendant cites cases from six jurisdictions, including Alaska, which have been decided subsequent to the Uniformed Services Former Spouses Protection Act. In fact, Alaska has now decided that military pensions are divisible property (See Chase vs. Chase, 662 P.2d 944 (Alaska, 1983)).

As defendant recites in his brief, the community property states (8 of them) typically treat military retirement pay as a community asset and divide it between the parties.

The following jurisdictions have held that military retirement pay is property subject to division in a divorce proceeding: Alaska - Chase vs. Chase (Supra); Arizona - Czarnecki vs. Czarnecki, 600 P.2d 1098 (1979); California - In re Marriage of Stenquist, 582 P.2d 96 (1978); Hawaii - Linson vs. Linson, 618 P.2d 748 (1980); Idaho - Lang vs. Lang, 711 P.2d 1322 (1985); Montana - In re Marriage of Kecskes, 683 P.2d 478 (1984); New Mexico - Waltenkowski vs. Waltenkowski, 672 P.2d 657 (1983); Oregon - Matter of Marriage of Wood, 676 P.2d 338 (1984); Washington - In re Marriage of Landry, 699 P.2d 214 (1985); New Jersey -

Castiglioni vs. Castiglioni, 471 A.2d 809 (1984); Iowa - In re Marriage of Schissel, 292, NW.2d 421 (1980); Missouri - Coates vs. Coates, 650 SW.2d 307 (1983); Texas - Voronin vs. Voronin, 662 SW.2d 102 (1983); Illinois - re Marriage of Dooley, 484 NE.2d 894 (1985); Louisiana - Allen vs. Allen, 484 So.2d 269 (1986).

In summary, there is no logical reason to treat military retirement pay any differently than other type of retirement pay. Utah uses an equitable approach in divorce proceedings, and there certainly is no equitable reason for military retirement pay to be handled differently. At one time, there was indeed a legal reason, to wit, the McCarty case and its predecessors. Under those cases, states were forbidden from dividing military retirement pay. However, the McCarty case was quickly, thoroughly and soundly overruled by Congress and there is no longer any legal reason for treating military retirement pay differently.

Defendant's argument that all distinctions between income and marital property would be lost if military retirement pay is to be classified as "property" was rejected by this very Court in Woodward.

POINT III

THE COURT DID NOT MODIFY THE DECREE TO CLASSIFY DEFENDANT'S MILITARY RETIREMENT PAY AS MARITAL PROPERTY AND THE COURT DID NOT ABUSE ITS DISCRETION.

Defendant argues to the Court that the Court modified the Decree of Divorce to classify the defendant's income as marital property.

A cursory examination of the record shows that this is not what happened in the lower court.

The parties entered into a Stipulation (R., 4-8), which in turn was incorporated into the Findings of Fact and Conclusions of Law (R., 10-11), and the Decree of Divorce (R., 12-15). No appeal was taken from the Decree.

Thereafter, in February 1984, defendant initiated a hearing on an Order to Show Cause in an attempt to lower or terminate the alimony he was paying to the plaintiff. Plaintiff responded, a hearing was held, and an Order was entered (R., 31-34). As is evident from the record, that entire proceeding occurred with no mention of defendant's new-found theory that the division of his retirement pay was alimony, not property. In fact, it is clear from the Order entered in that February 1984 proceeding that alimony was considered to be $490 per month, child support was considered to be $150 per month, leaving the division of retirement pay as property.

The record reflects substantial communication between the parties and their attorneys thereafter (R., 35-44), including two separate stipulations, neither of which deal in any way with the issue of retirement pay.

In November 1985, for the first time, defendant raised the issue of his retirement pay, by filing a Motion seeking the termination of alimony, "to include that portion being withheld from his retirement pay". (R., 47). Other matters were raised in that Motion and in plaintiff's response, none of which are appealed.

The Trial Court was called upon to interpret its Decree, not modify the same. Neither party requested nor presented evidence in support of modification regarding the issue of retirement pay.

It should be noted at this juncture that if this Court feels that defendant's Motion could or should be interpreted as a request for modification, then the defendant failed to prove the necessary compelling reasons to modify as required by this Court in Foulger vs. Foulger, 626 P.2d 412 (Utah, 1981), which is quoted by the defendant in his brief. Also, see Land vs. Land, 605 P.2d 1248 (Utah, 1980), and Despain vs. Despain, 610 P.2d 1303 (Utah, 1980), both quoted and referred to in defendant's brief. If defendant's Motion is so interpreted, then defendant failed in his proof, did not meet the appropriate standard, and his appeal should be dismissed.

On the other hand, from the record it would appear that the parties and the Trial Court viewed the issue of retirement pay as one of interpreting the decree. Following that theory, the Trial Court heard argument from the parties, but did not invite or accept any testimony or new evidence, stating that the matter could be decided from the Stipulation, Decree, and on the record itself (T., 33-34).

As this Court has stated many times, the standard of review in divorce proceedings is that this Court will not disturb a Trial Court's findings and orders absent an abuse of discretion. See Wiese vs. Wiese, 699 P.2d 700 (Utah, 1985); Fletcher vs. Fletcher, 615 P.2d 1218 (Utah, 1980); Lord vs. Shaw, 682 P.2d 853 (Utah, 1984) - (absent an abuse of discretion, the Supreme Court will not substitute its judgment for that of the Trial Court).

The situation presented to this Court is one of a Trial Court interpreting its own Decree, and finding that the initial Decree had divided defendant's military retirement pay as property. Given the advantaged position of the Trial Court and the standard applied to such matters (noted above) this Court should not overturn the Trial Judge's interpretation.

The only amendment the Court made to the Decree was to change the division between the parties from one-half of gross to one-half of net. As was pointed out in the argument of both parties at the hearing (T., 20-22), the award in the Decree of one-half of the gross retired pay exceeded the amount allowed by Congress in 10 U.S.C. 1408.

Both parties agreed that the Decree should read "net" rather than "gross" (T., 20, lines 6-7).

In addition, the parties at the hearing in effect stipulated to the amendment changing "gross" to "net". On Pages 34, 35 and 36 of the transcript, the parties and the Court enter into a discussion concerning how to calculate the alimony arrearage. The discussion centered around whether or not Mr. Greene had overpaid plaintiff her portion of his pension during a time period when he was still receiving a full pension and then turning half of it over to her. Defendant's attorney indicated that the parties could "stipulate to what those figures are once we get his (the Court's) ruling. You have the numbers and I do. We should be able to work it out. We don't know what they are." (T., 34-35).

Also see Page 35 of the transcript, lines 4 through 10 and Page 36 of the transcript, lines 12-25.

Thus, there was agreement between the parties to modify the Decree so that the division of defendant's retirement pay was based upon his net retirement pay rather than his gross retirement pay.

During the hearing, it became apparent to the Court and all parties that it was necessary to amend or modify the Decree to provide for a division of the retirement pay on a net basis rather than a gross basis. The Court modified the Decree accordingly. Although the Court did not specifically make any findings or statement concerning the basis of its

authority to do so, it is apparent that the Court may modify its own Decree. In addition, Section 30-4a-1 of the Utah Code provides that the Court may enter nunc pro tunc orders in divorce cases. Although the Court in this case did not base its modification or change upon this statutory authority, it is respectfully submitted that the Court could have done so.

Also, Rule 60(b) of the Utah Rules of Civil Procedure provides for correcting or altering judgments for various reasons. Subdivision 5 of that rule provides that a final judgment may be altered if the judgment is void, while Subdivision 7 provides that a final judgment may be altered for any other reason justifying relief from the operation of the judgment.

Although this particular section was not invoked by the Court or any of the parties in the proceeding below, it would appear that the portion of the judgment granting one-half of the defendant's gross pay to plaintiff was either void or beyond the jurisdiction of the Court, and could be corrected pursuant Subdivision 5 or Subdivision 7 of Rule 60(b) to read net pay.

In his brief, defendant argues that the Stipulation should be construed strictly against the plaintiff, since the attorney representing her prepared the Stipulation and presented it to the Court. This same argument was presented by the defendant at the hearing. While that type of reasoning may be accurate when parties are litigating a

contract, it is not applicable in this case. The parties here are asking the Court to interpret a Decree of Divorce, not a stipulation. The Decree was entered by the Court, and the Court certainly has the authority to interpret it when presented directly with the issue.

Defendant further argues that "plaintiff must not be permitted to obtain a property interest in defendant's military retired pay three (3) years after she relinquished all such interest." (Appellant's brief, page 25). Plaintiff made no such relinquishment, and it is clear that the Court interpreted the Decree, and made no amendment granting the plaintiff a property interest. The only amendment made was to correct an obvious error, to wit, the granting of one-half the gross pay rather than one-half of the net.

CONCLUSION

Defendant's contention that military retirement pay should not be divisible under Utah law is improperly raised for the first time on appeal. Even if this Court considers the issue, the Woodward case clearly applies and the retirement pay was properly divided. The lower court correctly interpreted its own decree and then modified only one small portion of that decree. Any modification was proper.

Under well-established guidelines, this Court is not in a position to disturb the lower court ruling. There was no abuse of discretion, no unfairness and no inequitable treatment of the defendant. The defendant bargained for a division of his pension as property of the parties and now desires to be relieved of that bargain. The initial settlement and decree were fair and equitable to both parties, and should stand as interpreted by the Trial Court.

DATED this 28 day of January 1987.

Respectfully submitted,

BUNDERSON & BARON

Jon J. Bunderson
Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing RESPONDENT'S BRIEF, postage prepaid, this 28 day of January 1987 to:

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Secretary